

**Security Council**

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**Letter dated 12 January 2001 from the Secretary-General
addressed to the President of the Security Council**

1. I have the honour to refer to the letter of 22 December 2000, addressed to me from the President of the Security Council (S/2000/1234), by which members of the Council conveyed their views on my report on the establishment of the Special Court for Sierra Leone (S/2000/915) and proposed amendments (see S/2000/1234, annex), to the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute annexed thereto (see S/2000/915, annex). In incorporating the proposed amendments to the two documents, I wish to put before the members of the Council my understanding of the meaning, scope and legal effect of some of the proposals made. My intention is then to present the amendments in that light to the Government of Sierra Leone. These understandings pertain to the personal jurisdiction of the Special Court, the funding and the reduced size of the Court.

I. Personal jurisdiction — article 1 (a) of the draft Statute

2. Members of the Council expressed preference for the language contained in Security Council resolution 1315 (2000), extending the personal jurisdiction of the Court to "persons who bear the greatest responsibility", thus limiting the focus of the Special Court to those who played a leadership role. However, the wording of subparagraph (a) of article 1 of the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor and ultimately to the Special Court itself. Any such determination will have to be reconciled with an eventual prosecution of juveniles and members of a peacekeeping operation, even if such prosecutions are unlikely.

3. Among those who bear the greatest responsibility for the crimes falling within the jurisdiction of the Special Court, particular mention is made of "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone". It is my understanding that, following from paragraph 2 above, the words "those leaders who ... threaten the establishment of and implementation of the peace process" do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy. Consequently, the commission of any of the statutory crimes without necessarily threatening the establishment and



implementation of the peace process would not detract from the international criminal responsibility otherwise entailed for the accused.

4. In subparagraphs (b) and (c) of article 1 of the draft Statute as revised, the Council proposes to deal in a comprehensive manner with all perpetrators of crimes falling within the jurisdiction of the Special Court, including peacekeeping personnel present in Sierra Leone during the relevant period. While recognizing the primary jurisdiction of the sending State over its peacekeeping personnel, the Council recognizes the need to authorize the Special Court to exercise its jurisdiction in the event that the sending State is unwilling or unable to carry out an investigation or prosecution. The amended article, however, falls short of inducing the unwilling State to surrender an accused person situated in its territory, with the result that a State which is unwilling to prosecute a person in its own courts would in all likelihood be unwilling to surrender that person to the jurisdiction of the Special Court.

5. In order to give full effect to the amended provision and to avoid politicization of a legal process by allowing third States to intervene and determine whether the sending State is unable or unwilling to investigate and prosecute, I suggest that a procedure similar to the one adopted in the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda be adopted in the case of the Special Court for Sierra Leone. Accordingly, the President of the Special Court, if convinced that the sending State is unable or unwilling to prosecute, may notify the Security Council and seek its intervention with the State in question to induce it to investigate and prosecute or to surrender the accused to the jurisdiction of the Court. I suggest that the following formulation replace the one presently contained in subparagraph (c) of article 1:

"In the event that the President of the Special Court is convinced that the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, he or she shall notify the Security Council and seek its intervention with the sending State in order to induce it to conduct the investigation and prosecution in its own courts, or to surrender the accused to the jurisdiction of the Special Court."

6. The Rules of Procedure and Evidence of the Special Court will have to give effect to the new statutory provision by setting out the procedure for investigation by the prosecutor, the submission of a request for information on an investigation or prosecution carried out in the sending State or its intention in that regard, the transmittal of the evidence compiled in case of an investigation or prosecution in the sending State, or the submission of an indictment to the Trial Chamber in a manner similar to the one prescribed in rule 61 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

7. Article 7 of the draft Statute, as amended, retains the principle of juvenile prosecution but omits any reference to a minimum age or to the guarantees of juvenile justice. On the understanding the members of the Security Council did not intend to allow prosecution below the age of 15, I suggest that article 7 should be amended to read:

"The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was, at the time of the alleged commission of the crime, between 15 and 18 years of age come before the Court ...".

It is also my understanding that persons in this age group, if brought before the Court, will be entitled to all the guarantees stipulated in the draft Statute annexed to my report.

8. In proposing amendments to article 7, the members of the Security Council have also omitted any reference to the consequences of sentencing a juvenile, which were regulated in article 7, paragraph 3 (f) of the draft Statute attached to my report (cf. also article 19, paragraph 1). Even if it is unlikely that the Court would sentence a juvenile, the law must nevertheless clearly state that the Court is prohibited from applying imprisonment. I therefore propose that paragraph 3 (f) of the draft Statute be retained as article 7, paragraph 2. Consequently, the text proposed in the previous paragraph would become article 7, paragraph 1.

9. As pointed out by the Security Council, the Truth and Reconciliation Commission will have an important role to play in the case of juvenile offenders and I will endeavour, in cooperation with the Government of Sierra Leone and other relevant actors, to develop suitable institutions including specific provisions related to children to that end. I am also of the view that care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.

II. Funding — article 6 of the Agreement

10. In my report to the Security Council, I underscored the need for a viable and sustainable financial mechanism and noted that a financial mechanism based on voluntary contributions will not provide the assured and continuous source of funding required for the operation of the Special Court (S/2000/915, para. 70). I concluded that a Special Court based on voluntary contributions would be neither viable nor sustainable. In recognizing the risks involved in commencing the operation of the Special Court on the sole basis of prospects of voluntary contributions, members of the Council proposed that the process of establishing the Court shall not commence until the United Nations Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations, as well as pledges equal to the anticipated expenses of the second 12 months.

11. I have examined the proposal made by members of the Security Council to defer the commencement of the implementation stage until contributions for the establishment and the first year of operations are in hand and pledges for the second year are obtained. While the necessary funds for the establishment and first year of operations (US\$ 25 million, according to the rough estimates provided in my report) may be obtained, I would still caution against the establishment of the Court on the basis of availability of funds for one year and pledges for the following year. Such a financial mechanism is not likely to ensure a regular flow of funds in the subsequent years, let alone the viability of the Court throughout its life span. I am therefore obliged to reiterate what I said in my report about the risks associated with the

establishment of an operation of this kind with insufficient funds, or without assurances of continuous availability of funds (S/2000/915, para. 70).

12. However, in view of the position expressed in the President's letter of 22 December 2000, I am ready to negotiate the conclusion of an Agreement for the establishment of a Special Court on the basis of voluntary contributions as suggested by members of the Security Council. I am nevertheless reluctant to engage the responsibility of the United Nations at this stage by concluding an Agreement with the Government of Sierra Leone in the absence of an indication as to whether funds are likely to be made available for the start-up of the Court and its sustained operation thereafter. I would, therefore, propose that the process of establishing the Court shall not commence until the United Nations Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations, as well as pledges equal to the anticipated expenses of the following 24 months. This extension of the Council's proposal by a further 12 months would provide a basis for a functioning Court over three years, which in my view is the minimum time required for the investigation, prosecution and trial of a very limited number of accused. I suggest, therefore, that as soon as an agreement is reached in principle between members of the Security Council, the Secretary-General and the Government of Sierra Leone, I will launch an appeal to all States to indicate, within a reasonable period of time, their willingness to contribute funds, personnel and services to the Special Court for Sierra Leone and to specify the scope and extent of their contributions. Upon receipt of concrete information, I will be able to assess whether the process of establishing the Special Court may commence or whether the matter should revert to the Council to explore alternate means of financing the Court.

13. In this connection, I welcome the idea of creating a committee to support the Special Court, and in particular the budgetary process. At the time of its establishment, however, it will be necessary to lay down clearly the criteria for the composition of the committee and its powers and responsibilities in order to ensure the efficient and cost-effective functioning of the Special Court in full independence. Pending the establishment of such a committee, and until it is otherwise decided, it is my intention to apply the United Nations Financial Regulations and Rules and Staff Regulations and Rules to the financial and administrative activities of the Special Court.

III. Size of the Special Court

14. In reducing the size of the Special Court to a single Trial Chamber and an Appeals Chamber, members of the Security Council proposed that the appointment of alternate judges be deferred until such time as the need arises, and not before six months of the commencement of the functioning of the Special Court. While, as rightly indicated in the President's letter, alternate judges were not foreseen in the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the solution adopted by both Tribunals to the problem of absentee judges was to alternate judges between the Trial Chambers, and between the Trial and the Appeals Chamber. In the reduced structure of the Special Court, this option would neither be possible nor appropriate.

15. I would appreciate the concurrence of members of the Security Council to the changes proposed in my letter to articles 1 and 7 of the draft Statute as revised, and to my proposal to seek concrete information from States with respect to their preparedness to contribute funds, services and personnel before the conclusion of the Agreement with the Government of Sierra Leone.

(Signed) Kofi A. Annan